Green Jobworks, LLC *and* Construction and Master Laborers' Local Union 11, a/w Laborers' International Union of North America (LIUNA). Case 05–CA–168637

February 4, 2020

ORDER DENYING MOTION AND REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 28, 2016, by Construction and Master Laborers' Local Union 11, a/w Laborers' International Union of North America (LIUNA) (the Union), the General Counsel issued the complaint on October 25, 2017, alleging that Green JobWorks, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 05–RC–154596. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 21, 2017, the General Counsel filed a motion for summary judgment and to transfer the case to the Board. On December 22, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a statement of cause opposing the General Counsel's motion, and the Union filed a response.

For the reasons set forth below, we deny the General Counsel's motion and remand Case 05–RC–154596 to the Regional Director for Region 5 for further consideration.

In the underlying representation proceeding, following the mail-ballot representation election held November 3, 2015, through November 24, 2015, the Union was certified on December 22, 2015,[1] as the exclusive collective-bargaining representative of employees in the following unit:

> All full-time and regular part-time laborers, including demolition and asbestos removal workers, and lead employees employed by Green JobWorks, LLC, and assigned to ACECO, LLC work sites, but excluding office clericals, professionals, confidential employees, managerial employees, guards, and supervisors as defined by the Act.

On March 8, 2016, the Board granted the Union's request for review of the Regional Director's Decision and Direction of Election and denied the Respondent's request for review of the Regional Director's Decision and Direction of Election, which rejected the Respondent's contention that the petitioned-for unit described above is not an appropriate unit.[2] *Green JobWorks, LLC/ACECO, LLC (A Joint Employer)*, Case 05–RC–154596 (unpublished order March 8, 2016) (Member Miscimarra, dissenting).

On December 15, 2017, prior to the General Counsel filing his motion for summary judgment in the present case, the Board issued an Order Granting Review and Remanding for further consideration in *PCC Structurals, Inc.*,[3] in which the Board majority (then-Chairman Miscimarra and Members Kaplan and Emanuel) overruled the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013), and reinstated the traditional community of interest standard. The Board's "usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises,* 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006–1007 (1958)). Indeed, "[t]he Board's established presumption in representation cases like this one is to apply a new rule retroactively." *Cristal USA, Inc.*, 368 NLRB No. 137, slip op. at 2 (2019) (quoting *BFI Newby Island Recyclery (Browning-Ferris),* 362 NLRB 1599, 1600 (2015), affd. in part and revd. in part 911 F.3d 1195 (D.C. Cir. 2018)).

In determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, above, at 673 (quoting *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule "to the parties in the case in which the new

[1] The Regional Director inadvertently issued a Certification of Representative on December 16, 2015, and the following day issued an order revoking it.

[2] The Board granted the Union's request for review to consider whether the Regional Director had correctly determined that Green JobWorks, LLC and ACECO, LLC were not joint employers. However, on September 1, 2017, the Union requested to withdraw its request for review, and on September 7, 2017, the Board granted the Union's request.

[3] 365 NLRB No. 160 (2017) (Members Pearce and McFerran, dissenting).

rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice." Id. (internal quotations omitted). In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

Applying these principles, we find that retroactive application of *PCC Structurals* here would not work a manifest injustice. See *Cristal USA, Inc.*, 368 NLRB No. 137, slip op. at 2. The Union argues that it relied upon *Specialty Healthcare* in selecting the scope of the petitioned-for unit; however, the Board implicitly rejected the view that any such reliance would preclude retroactivity in *PCC Structurals* itself, where the Board remanded the case to the Regional Director for further proceedings applying the standard announced by the Board therein even though the union in that case also presumably relied on *Specialty Healthcare*.[4]

We also recognize that a remand for application of *PCC Structurals* will delay the final disposition of the question concerning representation presented in this case. While prompt determination of such issues is an important purpose of the Act, it is equally true that the Board must insure in each case that units found appropriate will relate to the actual circumstances of the workplace. See *Kalamazoo Paper Box Co.,* 136 NLRB 134, 137 (1962), ("if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered"). For the reasons fully explained in *PCC Structurals,* application of the traditional community of interest standard is essential to the achievement of this goal and comports better with the statutory language set forth in Section 9(a), 9(b), and 9(c)(5) of the Act than did *Specialty Healthcare*. On balance, these considerations support retroactive application of *PCC Structurals* here.

Nor is retroactive application precluded at this stage of the proceeding simply because the Board has previously certified the Union. Absent special circumstances, the Board generally will not permit the relitigation, in a certification-testing case, of issues that were or could have been litigated in the representation case. See, e.g., *Radnet Management d/b/a La Mirada Imaging,* 368 NLRB No. 89, slip op. at 1 (2019). However, in light of *PCC Structurals*, the Board has remanded cases to the Regional Director to further analyze the appropriateness of units under the reinstated traditional community of interest standard. See *Cristal USA, Inc.*, 368 NLRB No. 137, slip op. at 2–3; *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2–3 (2019).[5] We reach the same result here.

Accordingly, we deny the General Counsel's motion and remand Case 05–RC–154596 to the Regional Director for further appropriate action, including analyzing the appropriateness of the unit under the standard articulated in *PCC Structurals* and for the issuance of a supplemental decision. The Regional Director may solicit the parties' positions on whether the current record is sufficient to evaluate the evidence under *PCC Structurals* and may reopen the hearing for further evidence, if necessary.[6]

Dated, Washington, D.C. February 4, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

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[4] The Board has also remanded several pre-certification representation cases pending at the time *PCC Structurals* was issued. See, e.g., *Colonial Parking, Inc.,* Case 04–RC–187843 (unpublished order remanding issued March 23, 2018); *IGT Global Solutions,* Case 01–RC–176909 (unpublished order remanding issued April 25, 2018). The petitioning unions in those cases also presumably crafted the units sought in reliance on *Specialty Healthcare,* and the Board's remands in those cases are thus likewise inconsistent with the view that the Board should refuse to apply *PCC Structurals* retroactively on that basis.

[5] See also *St. Francis Hospital,* 271 NLRB 948, 949 (1984) (Board permitted relitigation of unit determination where there was an intervening change in the legal standard applicable to the unit determination).

[6] As evidenced by our remand, we express no opinion with respect to whether the petitioned-for unit is appropriate.